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United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 163, FOOD AND DRUGS ACT.

MISBRANDING OF "MAPLEINE."

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906 and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court in the case of the United States v. 300 Cases of Mapleine, a proceeding of libel for seizure and condemnation of said Mapleine under section 10 of the aforesaid act lately pending, and finally determined by entry of a decree of condemnation and forfeiture on September 18, 1909, in the District Court of the United States for the Northern District of Illinois, wherein Crescent Manufacturing Company, of Seattle, Washington, was claimant. The article was misbranded within the meaning of section 8 of the act in that the cases containing it were labeled and branded "Crescent Mapleine," thereby representing that it contained a product of the maple tree, whereas it contained none of such product.

INTERVENTION, CLAIM, EXCEPTION, AND ANSWER OF CRESCENT MANUFACTURING COMPANY.

To the original and amended libels of the United States, filed, respectively, on December 16, 1908 and April 28, 1909, praying seizure, condemnation, and forfeiture of the Mapleine, Crescent Manufacturing Company, the manufacturer and shipper of said Mapleine, intervened and filed its claim, exceptions and answer, wherein, as matter of answer, it admitted that the cases of Mapleine were in the City of Chicago at the time the libel was filed, denied that the article was misbranded; and alleged that the article was a flavoring extract and not a syrup and was a healthful vegetable product, containing no poisonous or deleterious substance; that it was much darker than maple syrup and in no way resembled maple syrup; that Mapleine was a mixture or compound long known as an article of food under its own distinctive

name; and that Mapleine was a trade name registered as a trademark in the United States Patent Office; and, as matter of exception, alleged that the libel was insufficient and informal in that it was not under oath; that section 10 of the act was unconstitutional and void because it allowed the seizure and confiscation of property without requiring the filing of complaint or information under oath or affirmation as guaranteed by the Fourth Amendment to the Constitution; that the Food and Drugs Act, under which the seizure was made, was unconstitutional and void because Congress had no power to enact it; and that the seizure of said Mapleine was illegal and void because it had reached its destination at the time the libel was filed.

The foregoing exceptions of the claimant having duly come on for hearing, and having been fully argued, the court orally overruled them.

The case having duly come on for further hearing on the facts as alleged in the libel of the United States and the answer of claimant, and a jury having been demanded by the claimant, on April 28, 1909 the issue was submitted to the jury, and the testimony and arguments of counsel having been concluded on April 30, 1909, the court instructed the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

The Court (Sanborn, D. J.): This is a civil case, as distinguished from a criminal case, and is called a suit *in rem*. That is, a suit against property, there being in the first instance no defendant, but the owner of the property being allowed to intervene and set up a claim for the property and defend, proceeding just as if such owner were an original defendant in the suit. But it does not become a suit against any person at any stage of the case.

If there was a misbranding under the food and drugs statute, then as soon as the misbranded packages were started on shipment from Seattle to Chicago, they became forfeited to the United States. They might then be seized by the officers of the United States as its own property wherever the boxes might be found, so long as they are either being transported, or after transportation so long as they remain unloaded, unsold or in the original packages. If, however, the Government waits until the cases are broken open, then it at once loses all its title and ownership to the goods which it previously had, and then can only proceed under the criminal provision of the food and drugs act by prosecuting any person or any corporation who either ships misbranded goods or receives them, or delivers them in original packages to any other person.

I call to your attention this because counsel have adverted to the fact that the Government might have proceeded against the bottles. The Government had no right to proceed against the bottles, but must proceed only against the original packages, or else prosecute any person who has anything to do with the packages themselves.

Now, as this case is not technically brought against any person or any corporation, but only against the boxes, the fact that the Crescent Manufacturing Company may sustain a loss, if you find the cases were misbranded, or there was any false statement on the label, is not in question, and should not be considered by you in reaching the verdict, but as the case involves a for-

feiture of property, that is as the property becomes the property of the Government immediately upon being misbranded and shipped, and as the burden of proof is on the Government to show by the greater weight of the evidence that the label in question is false or misleading to the ordinary purchaser, it is your duty under these circumstances to scrutinize the evidence tending to show that the label was calculated to deceive more carefully than you otherwise would in the ordinary civil case. This is because misbranding is attended with harsh consequences operating, as it does, as a forfeiture of the property, of the ownership of all the articles so misbranded.

Now, in deciding the meaning of the word "Mapleine", you are to give it its ordinary and customary meaning, as understood by the general public, and not any technical meaning given it by any expert witness. You may consider, of course, all the testimony of all the witnesses, expert or otherwise, but the test is what the common run of purchasers would understand by the word. The important question is whether there was or was not a misbranding. You will notice how broad the law is in its definition. If the statement, design or device in question is false, or misleading, not necessarily as a whole, but in any particular, then there was a misbranding, if from the evidence you find that in any one point there was a false or misleading statement on the label, taking into consideration what I shall state hereafter as to the bottles and the cartons, then there should be a verdict of guilty.

The purpose of the law is not to protect experts or scientific men alone who know the nature and value of food products, but to protect ordinary people like you and me—people without scientific knowledge or experience.

Was there a false statement on the label—that is, a statement that was untrue, erroneous, or not strictly according to the fact? Or, was there in the label a misleading statement—one which would in any way tend to lead an ordinary person wrongly, and misguide or lead astray, lead into error, cause to mistake, delude or deceive? If you find the label was either false in any particular, or misleading in any particular, from any point of view, or any aspect which may reasonably be considered false or untrue, or calculated to deceive, mislead, delude, cause to mistake or lead into error or mistake, the ordinary purchaser; then there was a misbranding under the provisions of the statute. Now, in considering this question of false statement or misbranding, there are certain things which appear in the evidence, which you are not only allowed to take into account, but which you should consider. I may mention them as follows:

Whether purchasers of "Mapleine" bought from the box-label alone, or from the box-label and the statements on the cartons or wrappers and the bottles. Now, if you find that the "Mapleine" was bought from the labels on the cartons and bottles, then you may consider whether the ordinary purchaser, the average purchaser, would be deceived or misled.

Another question which you should take into account is whether "Mapleine" is known, or was when these boxes were seized, known as an article of food under its own distinctive name—and a distinctive name is either one so arbitrary or fanciful as to clearly distinguish it from all other things, or one which by common use has come to mean a substance clearly distinguishable by the public from everything else. In this connection, you should consider whether the evidence shows that there was no other article in the market or common or general to the public, used as a maple extract or containing maple product. You should also consider if you think that "Mapleine" was bought from the carton or bottle as well as from the words on the box, the size and appearance of the boxes or the cases or bottles, and the labels, the color of "Mapleine" as compared with genuine maple—its taste and smell—the price asked for it, and

the directions for its use. Even if you should believe that the word "Mapleine" standing alone would be deceptive and misleading, yet you may consider any statement contained on the carton or bottle which you believe the common run of purchasers would read in making their purchases. If you believe that "Mapleine" has been on the market a sufficient length of time and has been sufficiently advertised so as to have become generally known to the public as an article containing no genuine maple syrup or any maple product, but only to produce a maple flavor, then you should take this into consideration on the question whether the label was or was not deceptive or misleading. You should also consider that the label was registered as a trademark by the Commissioner of Patents of the United States, in connection with the picture of a leaf, as having some bearing on the question whether the word "Mapleine" has become a distinctive name, or is a distinctive name, as I have defined that term to you. You should also remember that "Mapleine" is not injurious to health. Further, if you believe from the evidence that no complaints of mistake or of being deceived or misled have been made by purchasers of "Mapleine", you may consider this as tending to show that the label on the cases, cartons and bottles is not calculated to deceive or mislead. But, it is not necessary, in order that you should render a verdict of guilty, that any person was actually deceived or misled into purchasing "Mapleine" by the label on the cases in question. It is enough if you find that the label is misleading in any particular.

Gentlemen, I stated to you that the Government had the right to seize the boxes, but after the boxes had become opened the Government lost its right to seize the contents of the boxes. I was slightly in error in making that statement, in not going further and stating that while the Government can only seize the original package, yet it may open the package, and if it finds anything wrong on the inside of the package which does not appear on the outside, that is any misbranding or any false statement, it has just as much right to proceed in a case of this kind upon that false statement or misbranding as it has upon the label on the outside of the package which is seized. But, if it does not seize the original package before it is opened, then it has no right whatever to do anything more than to prosecute any party who may deliver the goods or receive the goods in a criminal case.

Your verdict will be "Guilty" or "Not Guilty," and the verdict will be handed to you by the officer.

Referring to the second page of the charge, the paragraph commencing:

"Now, in deciding the meaning of the word "Mapleine," you are to give to it its ordinary and customary meaning."

The instruction given was that in deciding the meaning of the word "Mapleine" you are to give it its ordinary and customary meaning, as understood by the general public, and not any technical meaning given it by any expert witness. You are to consider all the testimony of all the witnesses, expert or otherwise, but the test is what the common run of purchasers would understand by the word. What is there about that that is uncertain or mixed?

The question is what this word "Mapleine" in connection with all the facts and circumstances of this case, means to the common run of purchasers.

You are to consider whether they bought on the box label, or on the label on the cartons and bottles; consider the language on the cartons; and after you have considered all of them, you are then to try and solve the question of misbranding—that is, whether the common run of purchasers would understand by that word that there was or was not any genuine maple in the product.

The question is what would the ordinary purchaser—just the common run of purchasers—in view of the way in which they buy it—language on the box

and everything that comes to their attention, looks of the bottle, color of it (if they see it), the fact that the bottle is small, and all other facts that present themselves to the purchaser when they come to buy the goods. What would they understand from the whole situation? Not exactly what the word "Mapleine" standing by itself—but the question is, what it means in connection with all the facts and circumstances that present themselves to the purchaser; how would the purchaser understand it, seeing the bottle, or seeing the box?

Even if you should believe that the word "Mapleine" standing alone, would be deceptive and misleading, yet you may consider any statement contained on the carton or bottle which you believe the common run of purchasers would read in making the purchase.

Now, gentlemen of the jury, in another part of the charge it was stated, the question was stated in this way: Was there a false statement on the label, that is a statement that was untrue, erroneous, or not strictly according to the facts. Or, was there in the label a misleading statement, one which would in any way tend to lead an ordinary person wrongly, or misguide, or lead astray. Now, there were two questions submitted there, and that was taken from the first part of section 8 of the law defining the word, "misbranded."

It says the word misbranded shall apply to all articles of food, the label, the package label, of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. Now, in determining what the meaning of this word misbranding was, you are to determine two things: Was the label false in any particular? was it misleading in any particular?

Now, whether or not it was false, depends a good deal, you see, upon whether it would mislead anybody, whether it would deceive anybody, because this term "Mapleine," of course, is a coined word, and is not in the dictionary. You heard the testimony as to what meaning was given it by the Crescent Manufacturing Company, but that is not the test. The test is, what is the general signification of the word, as the ordinary man would understand it? Was it false in any particular, in its true and proper signification? Now, its true and proper signification depends upon what the ordinary man would understand from all the facts and circumstances appearing in the evidence. These two things, while they are separate, are yet connected, because here is a term which starts out without any meaning—I mean any settled or definite, or dictionary meaning. The parties who coin the word give it a meaning, and then they send out the label with the word upon it. Now, the question is: Is there anything false in that word, any suggestion of any falsehood in that word, or any suggestion of anything misleading or deceiving in that word? Now, I think it comes down to the question as to what the people would understand by that word from the whole situation, including all the statements on the label, and anything else the purchaser would naturally see.

Here is a word that starts out without any meaning at all in the dictionary. It may be plain on its face, and may not. If you think this word is plain on its face, of course, you must find the property guilty under the law, but if you think this word is ambiguous on its face, then you may go into the question, what would the ordinary man understand by it, in view of all the facts and circumstances brought to his notice in purchasing the goods? The real purpose of the act is to protect the public against imposition. You may take that into consideration. Now, if nobody is injured, nobody harmed, what difference does it make?

I can see it is a close case, gentlemen, and a difficult question, but you must do the best you can with it.

The jury having returned a verdict finding the said Mapleine misbranded, on September 18, 1909, the court rendered its decree therein in substance and in form as follows:

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

UNITED STATES OF AMERICA
v.
THREE HUNDRED CASES OF CRESCENT MAPLEINE. } No. 10139.

DECREE OF THE COURT.

This cause coming on by motion of Edwin W. Sims, United States Attorney for the Northern District of Illinois, for entry of judgment, this court finds that it has jurisdiction in this case and of the respective parties thereto, and being fully advised in the premises further finds:

1. That on the sixteenth day of December, in the year of our Lord nineteen hundred and eight, the United States of America, by Edwin W. Sims, its attorney, filed an information in the nature of libel in this court against three hundred cases of an article of food called "Crescent Mapleine," and that forthwith a monition was issued to the United States Marshal for the Northern District of Illinois under which monition the said three hundred cases of Mapleine were seized in their original packages while in the possession of one W. H. Nicholls and Company, at numbers 33 to 35 River street, Chicago, in the State of Illinois, in the division and district aforesaid, and by virtue of the said monition and seizure the said three hundred cases of Crescent Mapleine are now in possession of the United States Marshal at Chicago, in the division and district aforesaid.

2. That the claimant has admitted in its answer to the information and libel against the goods aforesaid that the Crescent Manufacturing Company of Seattle, Washington, is the owner of the goods so seized as aforesaid; that the said goods so seized were shipped from Seattle, in the State of Washington, to Chicago, in the State of Illinois, and that the three hundred cases of Crescent Mapleine composing the interstate shipment aforesaid were stored in the possession of W. H. Nicholls and Company, at numbers 33 to 35 River street, Chicago, in the division and district aforesaid, at the time of the said seizure, and before the said cases of Crescent Mapleine had been delivered to the consignee.

3. That the case coming on for trial April 28, 1909, before a jury, upon the single issue joined as to whether the three hundred cases labelled "Crescent Mapleine, Serial No. 907, Crescent Mfg. Co., Seattle, U. S. A.", composing the interstate shipment aforesaid, and filled with an article of food called "Crescent Mapleine" were misbranded in manner and form as alleged in the said information as amended, the said jury, after hearing all the evidence and argument of counsel, returned a verdict of guilty.

It is therefore ordered, adjudged and decreed that the said three hundred cases of Crescent Mapleine composing the interstate shipment aforesaid, are misbranded within the terms of Section 8 of the Food and Drugs Act of the United States, enacted by the Congress of the said United States June 30, 1906, and the same are hereby declared to be forfeited and confiscated to the United States.

It is further ordered, adjudged and decreed, in lieu of the sale of the said property above described, as provided by Section 10 of the Food and Drugs Act of the United States aforesaid, that upon the payment of all the costs of this libel proceeding and the execution and delivery within thirty days from date hereof of a good and sufficient bond by the claimant, and surety to be approved by this court, or in the absence of the court, by the clerk thereof, in the sum of two thousand five hundred dollars, conditioned that said claimant, his agents or attorneys shall not dispose of the said Crescent Mapleine composing the shipment aforesaid in violation of the Act of Congress enacted June 30, 1906, known as the Food and Drugs Act of the United States, or against the laws of any state, territory or insular possession of the said United States, the said three hundred cases of Crescent Mapleine now in the possession of the United States be surrendered to the claimant.

The facts in the case were as follows:

Prior to December 4, 1908, an analysis was made in the Bureau of Chemistry of the United States Department of Agriculture of an article of food contained in bottles labeled and branded "Mapleine, a vegetable product, producing a flavoring similar to maple. A delicious flavoring for syrups, cakes, candies, bon bons, frosting, ice cream, etc., made by the Crescent Manufacturing Co., Seattle, Wash.", and it was found that the article contained no product of the maple tree. On or about December 14, 1908, an inspector of the aforesaid Department found in the possession of W. H. Nicholls and Company, Chicago, Illinois, 300 cases of the aforesaid article of food, each case containing three dozen two-ounce bottles labeled as aforesaid and being branded: "3 doz. 2 oz. Crescent Mapleine. Crescent Mfg. Co., Seattle, U. S. A. Serial No. 907." The said 300 cases of Mapleine had been shipped by the said Crescent Manufacturing Company from Seattle, Washington, on or about October 20 and November 10, 1908, to Louis Hilfer Company, Chicago, Illinois. It appearing that the Mapleine was misbranded within the meaning of section 8 of the act and that the aforesaid 300 cases had been transported from the State of Washington to the State of Illinois and remained in original unbroken packages, on December 15, 1908 the Secretary of Agriculture reported the facts to the United States Attorney for the Northern District of Illinois who, on December 16, 1908, filed a libel in the District Court of the United States for said District praying seizure, condemnation, and forfeiture of the said 300 cases, with the result hereinbefore stated.

JAMES WILSON,
Secretary of Agriculture.

JANUARY 13, 1910.

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